Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1996

DANIEL E. PIPES,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**Petition For Writ Of Certiorari From The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS OR DISMISS THE INDICTMENT BECAUSE OF DUE PROCESS VIOLATIONS AMOUNTING TO OUTRAGEOUS CONDUCT BY GOVERNMENT AGENTS.

II. WHETHER THE TRIAL COURT ERRED IN FAILING TO DISMISS THE INDICTMENT BECAUSE OF VIOLATIONS OF THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

## LIST OF ALL PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceedings in the United States Court of Appeals for the Sixth Circuit, whose judgment is sought to be reviewed in this case:

United States of America

Daniel E. Pipes

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## OPINIONS BELOW

The non-published Opinion of the United States Court of Appeals in *United States of America v. Daniel E. Pipes,* Number 95-6199 is reproduced in the Appendix at 1a.

## SUPREME COURT JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 2, 1996. This Petition for Writ of Certiorari is filed pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS CONSTRUED

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Tenth Amendment to the United States Constitution:

The powers not delegated to the United States by the Constitution, not prohibited by it to the states, are reserved to the states respectively, or to the people.

## STATEMENT OF THE CASE

The Defendant was charged along with co-defendant Martha M. Pratt on December 2, 1993 with attempting to possess to distribute marijuana. (R. 1, Complaint). On December 7, 1993, he was indicated for that offense as well as conspiracy with the same co-defendant. (R. 10, Indictment). On April 25, 1994, the Defendant filed his motion to suppress or dismiss because of due process violations. (R.109, Motion). On June 6, 1994, Magistrate Judge Thomas W. Phillips filed a report and recommendation to deny the motion to suppress or dismiss because of due process violations. (R. 125, Report and Recommendation). On September 9, 1994, the Defendant filed a supplemental memorandum of law in support of his motion to suppress or dismiss because of due process violations. (R. 137, Supplementary Memorandum of Law). On September 20, 1994, United States District Court Judge James H. Jarvis denied the Defendant's motion to suppress or dismiss because of due process violations. (R. 142, Order). On January 10, 1995, the Defendant changed his plea pursuant to a plea agreement reserving the question for appeal as to the trial court's overruling his motion to suppress or dismiss for due process violations. (R. 146, Ctrm. Minutes). On August 25, 1995, Judgment was pronounced in this case, and the Defendant was

permitted to appeal to the United States Court of Appeals for the Sixth Circuit the trial court's overruling of his motion to suppress and dismiss for due process violations. (R. 161, Judgment). On August 25, 1995, the Defendant filed his Notice of Appeal. (R. 162, Notice of Appeal). On August 28, 1995, the trial court stayed execution of Judgment pending decision by the United States Court of Appeals for the Sixth Circuit. (R. 163, Order Staying Execution of Judgment). The United States Court of Appeals for the Sixth Circuit filed its Opinion in this case affirming the District Court's decision on July 2, 1996.

## STATEMENT OF FACTS

During the summer and fall of 1993, State law enforcement officers, with the assistance of a paid operative, cultivated a relationship with Mr. Daniel E. Pipes in an attempt to entice him into purchasing illegal drugs. Finally, on December 1, 1993, these state agents were successful in setting up a "reverse sting" in which Mr. Pipes would be their target. In this reverse sting they attempted to sell a quantity of marijuana in Roane County, Tennessee.

The agents brought marijuana from Davidson County to Roane County to use in their reverse sting. The Nashville Metro Police Department had previously seized that marijuana. The Tennessee Bureau of Investigation contacted the Nashville Metro Police Department on November 30, 1993, and received verbal permission to use the marijuana. This permission was received from

Drug Custodian Officer Tim Allen. During the early afternoon of November 30, 1993, Agent Ronald Gaskins, of the Tennessee Bureau of Investigation, signed for the marijuana at the Nashville Metro Police Department. The marijuana was then taken from Davidson County to Roane County by state agents.

## SUMMARY OF ARGUMENT

**I. WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS OR DISMISS THE INDICTMENT BECAUSE OF DUE PROCESS VIOLATIONS AMOUNTING TO OUTRAGEOUS CONDUCT BY GOVERNMENT AGENTS.**

Tennessee Code Annotated § 53-11-451(d)(4) provides that:

> (4) Regardless of any other method of disposition of property contained in this chapter, use of the property taken or detained, ***with permission of the court*** and under such terms and conditions as are approved by the court, *for use in the drug enforcement program of* ***the county in which the goods are seized,*** and/or with the approval of the court having jurisdiction over the property, sell the property and utilize the proceeds for the drug enforcement program of the county in which the property was seized. [emphasis added].

For over two decades this has been the only legal way for officers in Tennessee to use seized controlled substances. The Attorney General of Tennessee issued a formal opinion on February 22, 1990, which stated that:

Subsection (d)(4) provides a method whereby a seizing agency may use property taken or detained if the agency receives judicial authorization. *The property can only be used by the seizing agency if the use has been authorized by the local circuit or criminal court* and *the property is to be used in the drug enforcement program of the county in which the goods are seized.* Attorney General's Opinion No. 90-19. [emphasis added – copy attached].

> It is the position of the Appellant that such a flagrant violation of state law is fundamentally unfair under the Due Process Clause of the Fifth Amendment. Using the test set out by the Sixth Circuit in *United States v. Barger,* 921 F.2d 359 (6th Cir. 1991) it is clear that the outrageous conduct of the government agents is clearly demonstrated when examining the four factors set out in *Barger.*

## II. WHETHER THE TRIAL COURT ERRED IN FAILING TO DISMISS THE INDICTMENT BECAUSE OF VIOLATIONS OF THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Tenth Amendment to the United States Constitution clearly reserves to the states and the people powers not delegated to the United States. In this case, Congress has not implemented any statute allowing the use of a confiscated controlled substance in a reverse sting such as in the instant case. Since the State of Tennessee has regulated the use, the United States should under our principles of federalism not interfere with the regulation by the state of the use of controlled substances in reverse sting cases. The United States, should respect, the state statute

and enforce its violation by suppressing the evidence in this case or dismissing the Indictment.

## ARGUMENT

### Standard of Review

The facts in this case are undisputed. The government admits that the officers violated the Tennessee statute. The standard of review, therefore, should be de novo because a question of law is presented.

### I. WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS OR DISMISS THE INDICTMENT BECAUSE OF DUE PROCESS VIOLATIONS AMOUNTING TO OUTRAGEOUS CONDUCT BY GOVERNMENT AGENTS.

Those who are given the responsibility of enforcing our laws are not above the law. They are granted specific exemptions which allow them to carry out their law enforcement duties. One of those exemptions is contained in T.C.A. § 53-11-451(d)(4). Subsection (d)(4) provides:

> (4) Regardless of any other method of disposition of property contained in this chapter, use of the property taken or detained, ***with permission of the court*** and under such terms and conditions as are approved by the court, *for use in the drug enforcement program of* ***the county in which the goods are seized,*** and/or with the approval of the court having jurisdiction over the property, sell the property and utilize the proceeds for the drug enforcement program of the county

> in which the property was seized. [emphasis added].

For over two decades this has been the only legal way for officers in Tennessee to use seized controlled substances. The Attorney General of Tennessee issued a formal opinion on February 22, 1990, which stated that:

> Subsection (d)(4) provides a method whereby a seizing agency may use property taken or detained if the agency receives judicial authorization. *The property can only be used by the seizing agency if the use has been authorized by the local circuit or criminal court* and *the property is to be used in the drug enforcement program of the county in which the goods are seized.*

Attorney General's Opinion No. 90-19. [emphasis added – copy attached].

Based on a fair reading of the government's responsive pleadings in this case, three separate violations of Tennessee state law have occurred in the present case:

> a. the marijuana used in this case was not seized in Roane County;
>
> b. it was not used by the agency that actually seized it; and
>
> c. despite a recent adverse ruling on precisely these same grounds, the officers chose not to obtain judicial authorization for this otherwise illegal use of contraband.

As a result, the officers illegally possessed this marijuana and could themselves be prosecuted under the laws of the United States or Tennessee for illegal possession with intent to distribute.

"Fundamental fairness is a core component of the Due Process Clause of the Fifth Amendment." *United States v. Barger,* 931 F.2d 359, 363 (6th Cir. 1991). and *United States v. Brown,* 635 F.2d 1207, 1212 (6th Cir. 1980). A plurality of the United States Supreme Court in *Hampton v. United States,* 425 U.S. 484 (1976), indicated that some police misconduct might be so egregious as to violate the accused's due process rights. Justice Powell noted that if police over-involvement reached a demonstrable level of outrageousness, it would be a bar to conviction. 425 U.S. at 495 n. 7.

Before relief can be granted, the challenged government conduct must violate fundamental fairness and be shocking to the universal sense of justice. *United States v. Barger,* 931 F.2d at 363. The Sixth Circuit has been reluctant to impose sanctions because "to do so would greatly intrude into the law enforcement functions of the executive branches of federal and state government." *United States v. Barger,* 931 F.2d at 363 (quoting from *United States v. Norton,* 700 F.2d 1072, 1075 (6th Cir.), *cert. denied,* 461 U.S. 910 (1983)).

The very concerns which have caused the Sixth Circuit to hesitate in the past, however now counsel in favor of imposing sanctions in this case. Failure to act would put this court in the position of intruding on the legitimate functions of the Tennessee Legislature and the Tennessee judicial system. State Law enforcement officers will be allowed to ignore the law as passed by the Legislature and bypass the oversight mandated by the statute. Unless checked, state agents can proceed with impunity to violate state law and then avoid the consequences of their official lawlessness by prevailing upon federal state

agents to hastily adopt what is in reality a State case. "Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law." *United States v. Toscanino*, 500 F.2d 267, 274 (2d Cir. 1974).

In *State v. Kummer*, 481 N.W.2d 437 (N.D. 1992), the Supreme Court of North Dakota reversed a conviction and remanded for a judgment of acquittal because state agents violated a contraband statute similar to Tennessee's.

After Mr. Kummer was acquitted in state court the local U.S. Attorney filed a federal indictment based on the same activities previously dismissed in state court. In *United States v. Kummer*, 15 F.3d 1455 (8th Cir. 1994), the Court affirmed Mr. Kummer's federal conviction by a split vote, 2-1. The panel held that under the federal subjective theory of entrapment, Mr. Kummer could be convicted of the federal offense in spite of his prior acquittal in state court.

The majority in *United States v. Kummer* did not specifically address the illegal actions of the state agents in acquiring the cocaine for their reverse sting. The majority acknowledged that a due process/outrageous conduct argument was not foreclosed by *Hampton v. United States*, supra but without mentioning the illegal activity of the offices, concluded that Kummer had failed to show a due process violation.[1]

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[1] The court of course did not address the present situation in which state law was flouted not once but twice within three months within the same small county.

The dissenting judge in *United States v. Kummer,* found outrageous conduct contrary to the fifth amendment. Judge Arnold stated:

> With respect, I disagree that the relevant facts here are not substantially different from those present in *United States v. Huff,* 959 F.2d 731 (8th Cir. 1992) and other cases in which we have upheld so-called reverse stings. The distinguishing fact is that in none of those cases did it appear that the police operation was put in motion by acts that violated state law.
>
> The court today evidently holds that it is not outrageous for sworn offices of the state to break the law. *For me, official illegality must almost always be outrageous, for if the government will not obey the law, how can it rightfully expect its citizens to feel an obligation to do so?*

15 F.3d at 1462-63. (emphasis added).

Whether a due process violation or "outrageous conduct" exists must always be decided on a case by case basis. Four factors to be weighed in determining if governmental conduct is "outrageous" are:

> (1) the need for the police conduct as shown by the type of criminal activity involved;
>
> (2) the impetus for the scheme or whether the criminal enterprise preexisted the police involvement;
>
> (3) the control the government exerted over the criminal enterprise; and
>
> (4) the impact of police activity on the commission of the crime.

*Barger,* 931 F.2d at 363.

The first factor weighs heavily in favor of finding a due process violation because there was no legitimate reason for the officers to ignore the statute and the courts. This is especially true in light of the fact that the Criminal Court of Roane County has dismissed a similar case on similar grounds just three months before.

Second, whether any criminal enterprise existed prior to December 1, 1993, is an open question. When the government begins and ends the activity with a reverse sting it may be impossible to know whether the criminal enterprise preexisted the reverse sting. Clearly the officers suspected that criminal activity preexisted but December 1, 1993, is the first time they had direct proof of criminal activity.

Third, the officers exerted considerable control over the criminal enterprise. They dictated when the attempted delivery would occur. They decided the quantity of drugs that would be involved. They helped establish the price and the terms under which the transaction would be consummated.

The fourth and final factor to be considered is the impact of the police activity on the commission of the crime. The illegal possession of controlled substances is not a prerequisite to effective law enforcement. In the present case, it appears uncontroverted that if the agents had not supplied the contraband there would have been no crime.

When considered together, the factors weigh heavily in favor of finding a due process violation or "outrageous conduct" in the actions of the agents in this case. To allow agents to repeatedly violate state law and then to also

allow them to escape the consequences of their transgression by retreating into federal court is shocking to a universal sense of justice and therefore violative of due process.

The now famous dissent of Justice Brandeis, in *Olmstead v. United States*, 277 U.S. 438, 485 (1928), eloquently warns us of the subtle dangers of official lawlessness:

> In a government of law, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good for for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the Government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against this pernicious doctrine this court should resolutely set its face.

This case is not a situation where officers have made an insignificant mistake. Instead, state agents acted illegally in the same county where the identical conduct had been specifically prohibited just three months before.

Mr. Pipes respectfully requests that this Court dismiss the indictment or suppress the tainted evidence because of these due process violations. If an evidentiary hearing is necessary, the defense requests an initial hearing to determine whether all of the officers involved in this prosecution be granted use immunity so they can

testify without fear of prosecution for illegal possession of contraband.

## II. WHETHER THE TRIAL COURT ERRED IN FAILING TO DISMISS THE INDICTMENT BECAUSE OF VIOLATIONS OF THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Tenth Amendment to the United States Constitution states:

> The powers not delegated to the United States by the Constitution, not prohibited to the states are reserved to the states respectively or to the people.

The United States Supreme Court in a line of cases beginning with *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465,49 L.Ed.2d 245 (1976) has held that the Tenth Amendment does not prohibit congressional regulation of commerce by making it an unconstitutional intrusion upon the sovereignty of state and local governments. The Supreme Court in *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941) held that the Tenth Amendment does not deprive "the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." at 124, 462.

The Tennessee Court of Criminal Appeals in *State v. Crawford*, 783 S.W. 2d 573 (Tenn. Crim. App. 1989) held that the statutory exclusionary rule of the Omnibus Crime Control Act of 1968 was not an intrusion prohibited by the Tenth Amendment. The Court, however, went on to hold:

> In our judgment, the Act provides only the minimum standards governing the interception of oral and wire communications; the states are not precluded from enacting legislation which is more restrictive. In this respect, there remains at least a modicum of power under the Tenth Amendment, "reserved to the states." *Crawford* at 576.

The United States District Court for the Eastern District of Michigan in *Michigan v. Meese,* 666 F.Supp. 974 (E.D.Mich. 1987), aff'd on other grounds, 853 F.2d 395 (6th Cir. 1988) held similarly that the Tenth Amendment did not prohibit enforcement of the Omnibus Crime Control Act of 1968. The Court in *Meese* held that congress can enact the statute that is necessary to implement its larger purposes. at 979. *Meese* went on to quote President James Monroe on the applicability of the Tenth Amendment as it relates to criminal laws:

> The administration of justice, and the whole criminal code, except in cases of breaches of the laws of the United States made under and in conformity with the powers vested in Congress . . . are regulated by state laws. *The Founders' Constitution* 406 (P. Kurland & R. Lerner ed. 1987).

Clearly in this case the Congress has not implemented any statute allowing the use of a confiscated controlled substance in a reverse sting such as in the instant case. 21 U.S.C. 881(f)(1) only provides for the destruction of Schedule I controlled substances once they are forfeited. Under the Tenth Amendment, therefore, Congress has left any such regulation to the states. The State of Tennessee has enacted such a regulation in T.C.A.

§ 53-11-451(d)(4). Applying the Tenth Amendment to that statute, therefore, binds the United States to observe and follow that statute. In this case, the statute clearly was not followed and was violated by law enforcement agents. The only way to deter future violations of the statute and, consequently, the Tenth Amendment to the United States Constitution is to suppress said evidence or dismiss this indictment.

## CONCLUSION

For all the reasons stated above, the Appellant respectfully requests this Court to remand the case to the trial court with instructions to dismiss this indictment or, in the alternative, to suppress the evidence.

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# APPENDIX

*RECOMMENDED FOR FULL-TEXT PUBLICATION*
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0193P (6th Cir.)
File Name: 96a0193p.06

No. 95-6199

**UNITED STATES COURT OF APPEALS**

FOR THE SIXTH CIRCUIT

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| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* | ) | ON APPEAL from the |
| *v.* | ) | United States District |
| | ) | Court for the Eastern |
| DANIEL E. PIPES, *Defendant-Appellant.* | ) | District of Tennessee |

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Decided and Filed July 2, 1996

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Before KENNEDY and CONTIE, Circuit Judges, and GRAHAM, District Judge.*

KENNEDY, Circuit Judge. Defendant pled guilty to conspiracy to possess with intent to distribute marijuana while reserving his right to appeal the District Court's denial of his suppression motion. Defendant argues that his conviction should not stand because Tennessee law enforcement officers' violation of a state law requiring prior judicial approval before seized marijuana may be

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* The Honorable James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

used in a reverse sting operation violated his due process rights. For the following reasons, we affirm.

## I

Defendant was arrested in Roane County, Tennessee on December 1, 1993 while in the process of purchasing forty-two pounds of marijuana from an undercover special agent with the Tennessee Bureau of Investigation. The Federal Bureau of Investigation had joined the investigation as of November 30, 1993. Part of the marijuana used in the reverse sting operation came from the Nashville Metro Narcotics Department, in Davidson County, and part came from the Tennessee Bureau of Investigation. The law enforcement officers had not received judicial approval before using the marijuana obtained from Davidson County.

On December 2, 1993, defendant was indicted for attempting to possess with intent to distribute marijuana and conspiring to possess with intent to distribute. Defendant entered into a plea agreement with the United States under which he would plead guilty to count two of the indictment, the conspiracy count, while retaining the right to appeal the denial of his motion to suppress. This appeal followed.

## II

Defendant raises two arguments on appeal. First, defendant claims that the Tennessee officers' violation of TENN. CODE ANN. § 53-11-451(d)(4) (1991), which requires prior judicial approval before seized contraband may be

used in a reverse sting operation, violates due process. Second, defendant claims that since Tennessee exercised its powers under the Tenth Amendment to the United States Constitution when it required prior judicial approval for the use of confiscated contraband in reverse sting operations, the United States cannot violate this state requirement when prosecuting federal crimes.

A

Defendant first argues that the Tennessee officers' violation of a Tennessee regulation regarding use of confiscated contraband was so outrageous as to violate due process. The state law at issue, TENN. CODE ANN. § 53-11-451(d)(4) (1991), states:

> (d) Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the director or the director's authorized representative, agent or employee, the commissioner or the commissioner's authorized representative, agent or employee, or a sheriff, deputy sheriff, municipal law enforcement officer, or constable, subject only to the orders and decrees of the circuit or criminal court. When property is seized under parts 3 and 4 of this chapter or title 39, chapter 17, part 4, the seizing authority may:
>
> . . .
>
> (4) Regardless of any other method of disposition of property contained in this chapter, use the property taken or detained, with permission of the court and under such terms and conditions as are approved by the court, for use in the drug enforcement program of the county

> in which the goods are seized, and/or, with approval of the court having jurisdiction over the property, sell the property and utilize the proceeds for the drug enforcement program of the county in which the property was seized.

Defendant also cites Tennessee's Attorney General's interpretation of this provision:

> Subsection (d)(4) provides a method whereby a seizing agency may use property taken or detained if the agency receives judicial authorization. The property can only be used by the seizing agency if the use has been authorized by the local circuit or criminal court and the property is to be used in the drug enforcement program of the county in which the goods are seized.

Tenn. Op. Atty. Gen. No. 90-19 (Feb. 22, 1990). Here, the Tennessee officers admit that they did not receive judicial approval before using confiscated marijuana to engineer the reverse sting operation that ensnared defendant. Defendant claims that the officers also violated the statute because the marijuana used in this case was not seized in Roane County and was not used by the agency that actually seized it.

Because defendant does not clearly articulate the theory behind his asserted violation of due process, it is necessary to consider the possible approaches by which such a claim could be made. Defendant does not argue that the officers' violation of TENN. CODE ANN. § 53-11-451(d)(4) (1991) amounted to entrapment. In any case, that approach has been rejected by the Supreme Court, which noted that an entrapment defense is based on a defendant's lack of predisposition, not on officer

misconduct. *See, e.g., United States v. Russell*, 411 U.S. 423, 433 (1973).

Nor does defendant present an entrapment defense based on due process notions, under which "the government's involvement in creating his crime, *i.e.*, the means and degree of inducement, was so great, 'that a criminal prosecution for the [crime] violates the fundamental principles of due process,' his predisposition to commit the crime notwithstanding." *United States v. Tucker*, 28 F.3d 1420, 1422 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1426 (1995), quoting *Russell*, 411 U.S. at 430. Indeed, such an argument is also unavailable to this defendant, for the officers' failure to comply with TENN. CODE ANN. § 53-11-451(d)(4)(1991) did not cause defendant to conspire to possess with intent to distribute marijuana. The defendant obviously did not know that the officers were violating TENN. CODE ANN. § 53-11-451(d)(4)(1991). Thus, the officers' failure to comply with the state regulation had no impact on defendant's decision to commit the offense to which he has pled guilty. *See United States v. Caceres*, 440 U.S. 741, 752-53 (1979) (rejecting defendant's claim that evidence should be suppressed because government's failure to comply with regulations requiring IRS authorization for eavesdropping violated due process, for "[r]espondent cannot reasonably contend that he relied on the regulation, or that its breach had any effect on his conduct."). Indeed, the Tennessee Court of Appeals recently rejected an argument that officers' noncompliance with TENN. CODE ANN. § 53-11-451(d)(4) (1991) required suppression of the evidence. *State v. Patton*, 898 S.W.2d 732 (Tenn. Crim. App. 1994), *appeal denied*, (Mar. 6, 1995). In *Patton*, the Court found no nexus between the

noncompliance and defendant's due process rights to life, liberty, or property:

> Thus, because we can find no significant connection between the failure on the part of the police to comply with the statute and the alleged criminal acts on the part of the defendant, a suppression of the evidence would contribute nothing toward the protection of individual rights.

898 S.W.2d at 735.

Defendant cites cases in which courts consider whether police officers' outrageous conduct might prevent a conviction notwithstanding defendant's predisposition to commit the crime. *See, e.g., United States v. Barger,* 931 F.2d 359 (6th Cir. 1991). But defendant does not claim that the government's allegedly outrageous conduct caused him to be entrapped despite his predisposition. Thus, cases like *Barger* are inapposite.

Defendant appears to be arguing then for a broader due process right: a right to be free from outrageous governmental conduct even when such conduct does not deprive individuals of a specific liberty interest. Thus defendant argues that "some police misconduct might be so egregious as to violate the accused's due process rights" without acknowledging that this proposition was announced in a case considering whether a defendant was entrapped by alleged police misconduct, not whether police misconduct per se violates due process. In support of his implicit argument, defendant encourages this Court to adopt Judge Arnold's dissent in an Eighth Circuit case rejecting a defendant's claim that noncompliance with a statute requiring judicial approval for use of marijuana in

a reverse sting operation was so outrageous as to constitute a violation of his due process rights. *United States v. Kummer*, 15 F.3d 1455 (8th Cir. 1994). In dissent, Judge Arnold wrote:

> The Court today evidently holds that it is not outrageous for sworn officers of the state to break the law. For me, official illegality must almost always be outrageous, for if the government will not obey the law, how can it rightfully expect its citizens to feel an obligation to do so?

*Kummer*, 15 F.3d at 1462-63 (Arnold, J., dissenting).

There is some potential case support for defendant's implicit theory. In *United States v. Russell*, the Supreme Court noted:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 U.S. 165 (1952), the instant case is not of that breed. . . . The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment.

*Russell*, 411 U.S. at 431-32. This passage does not appear to limit its scope to entrapment cases or violations of specific liberty interests. Moreover, *Russell* cites *Rochin*, in which the Supreme Court struck down a conviction based on evidence obtained when police officers had a doctor

administer an emetic solution through a tube into defendant's stomach so that defendant would vomit the evidence he had swallowed during a police raid, for "the conviction of the petitioner has been obtained by methods that offend the Due Process Clause." *Rochin v. California*, 342 U.S. 165, 174 (1952):

> [T]he proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents – this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

*Rochin*, 342 U.S. at 172. Because *Russell* and *Rochin* are written in such broad terms, they could be read to support a theory of due process that protects individuals from outrageous police conduct that shocks the conscience even if that conduct does not deprive individuals of a life, liberty, or property interest protected under the due process clause.

Before sanctioning such a novel and wide-ranging theory of due process, however, it suffices to note that defendant has not come close to alleging outrageous police conduct that shocks the conscience. The statute the Tennessee officers violated is concerned primarily with accounting for items that are subject to forfeiture. By requiring law enforcement officers to receive judicial

approval before using forfeited items in a drug enforcement action, the statute seeks to ensure that such items are used only on official police business rather than for officers' personal use. As such, Tenn. Code Ann. § 53-11-451(d)(4) (1991) has no relationship to this particular defendant's individual rights; it is designed to further the interests of all citizens in a lawful police force. In sum, because the noncompliance at issue in this case implicates no due process interests of the defendant, and does not shock the conscience, it cannot bar his conviction.

B

Citing *National League of Cities v. Usery*, 426 U.S. 833 (1976), defendant also argues that the United States is bound, under the Tenth Amendment to the United States Constitution, to respect Tennessee's law requiring law enforcement officials to receive judicial approval before using forfeited marijuana in reverse sting operations. This argument also fails.

First, *Usery* was explicitly overruled by *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985). Second, defendant has no individual right in requiring law enforcement officers to comply with TENN. CODE ANN. § 53-11-451(d)(4)(1991). Third, even if the State of Tennessee believed that its policy regarding use of seized contraband was so important as to merit suppression of evidence gained by means that violate that policy, *contra State v. Patton*, 898 S.W.2d 732 (Tenn. Crim. App. 1994), *appeal denied*, (Mar. 6, 1995) (rejecting defendant's motion to suppress evidence when officers did not comply with

TENN. CODE ANN. § 53-11-451(d)(4)), defendant lacks standing to raise the state's interests. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (noting that a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

## III

For the reasons stated above, we **AFFIRM** defendant's conviction and sentence.

Tenn. Op. Atty. Gen. No. 90-19
Office of the Attorney General
State of Tennessee

Opinion No. 90-19
February 22, 1990

CRIMINAL LAW AND PROCEDURE:

Confiscation/Fortfeiture/Disposition:

T.C.A. Sec.53-11-409(d) authorizes a local circuit or criminal judge to allow the police who seize controlled substances to use the property for "reverse sting" operations or other investigative operations related to the arrest and prosecution of drug offenders. T.C.A. Sec.39-6-401 *et seq.*, Secs.39-17-401 *et seq.*, through 427, Secs.53-11-308, -401 *et seq.*, -409 through -415.

DRUGS AND NARCOTICS: Confiscation: Tennessee Drug

Control Act of 1989

T.C.A. Sec.53-11-409(d) authorizes a local circuit or criminal judge to allow the police who seize controlled substances to use the property for "reverse sting" operations or other investigative operations related to the arrest and prosecution of drug offenders. T.C.A. Sec.39-6-401 *et seq.*, Secs.39-17-401 *et seq.*, through 427, Secs.53-11-308, -401 *et seq.*, -409 through -415.

JUDGES AND CHANCELLORS: Powers and Duties:

T.C.A. Sec.53-11-409(d) authorizes a local circuit or criminal judge to allow the police who seize controlled substances to use the property for "reverse sting" operations or other investigative operations related to the arrest and

prosecution of drug offenders. T.C.A. Sec.39-6-401 *et seq.*, Secs.39-17-401 *et seq.*, through 427, Secs.53-11-308, -401 *et seq.*, -409 through -415.

LAW ENFORCEMENT:

T.C.A. Sec.53-11-409(d) authorizes a local circuit or criminal judge to allow the police who seize controlled substances to use the property for "reverse sting" operations or other investigative operations related to the arrest and prosecution of drug offenders. T.C.A. Sec.39-6-401 *et seq.*, Secs.39-17-401 *et seq.*, through 427, Secs.53-11-308, -401 *et seq.*, -409 through -415.

Authority of Circuit or Criminal Judges to Allow Use of Seized Controlled Substances in Drug Operations

The Honorable Carl K. Kirkpatrick
District Attorney General
P.O. Box 526
Blountville, Tennessee 37617

QUESTION

Does Tenn. Code Ann. Sec. 53-11-409 authorize a judge to allow the police to use seized controlled substances for "reverse sting" operations or for any other law enforcement investigative purpose?

OPINION

Section 53-11-409(d) (1989 Cum. Supp.) authorizes a local circuit or criminal judge to allow the police who seize controlled substances to use the property for "reverse sting" operations or other investigative operations related to the arrest and prosecution of drug offenders.

## ANALYSIS

Section 53-11-409, Tennessee Code Annotated, provides for the seizure and disposition of various goods subject to forfeiture. Among the goods subject to forfeiture are "[a]ll controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of parts 3 and 4 of this chapter [Sec. 53-11-401 *et seq.*] or title 39, chapter 6, part 4 [Sec. 39-6-401 *et seq.* (now Sec. 39-17-401 *et seq.*)[1]]

Section 53-11-409(d) (1989 Cum. Supp.) provides:

Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the director of the Tennessee bureau of investigation or his authorized representative, agent, employee, the commissioner of safety or his authorized representative, agent, employee, or a sheriff, deputy sheriff, municipal law enforcement officer, or constable subject only to the orders and decrees of the circuit or criminal court. When property is seized under parts 3 and 4 of this chapter or title 39, chapter 6, part 4, the seizing authority may:

(1) Place the property under seal;

(2) Remove the property to a place designated by him;

(3) Require the director of the Tennessee bureau of investigation or his authorized representative, agent or employee, the commissioner of safety or his authorized

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[1] *Sections 39-17-401 – 39-17-427, 53-11-301 – 53-11-308, and 53-11-401 – 53-11-415 comprise the "Tennessee Drug Control Act of 1989." Tenn. Code Ann. Sec. 39-17-401 (1989 Noncumulative Supp.).

representative, agent or employee, or a sheriff, deputy sheriff, municipal law enforcement officer, or constable to take custody of the property and remove it to an appropriate location for disposition in accordance with law; or

(4) Regardless of any other method of disposition of property contained in this chapter, use the property taken or detained, with permission of the court and under such terms and conditions as are approved by the court, for use in the drug enforcement program of the county in which the goods are seized, and/or, with approval of the court having jurisdiction over the property, sell the property and utilize the proceeds for the drug enforcement program of the county in which the property was seized.

(A) In the case of property seized by the Tennessee bureau of investigation, the director of the bureau is authorized to designate in writing any part thereof for use by the bureau for any period of time, subject to inventory, management and disposition as provided by law.

(B) In the case of an aircraft seized by the Tennessee bureau of investigation, the director is also authorized to designate in writing any such property for transfer to and use by the department of general services subject to inventory, management and disposition as provided by law. If an aircraft is not sold, but is to be transferred to another state governmental entity, such transfer shall be approved by the commissioner of finance and administration.

(C) The proceeds from any sale conducted under this chapter of forfeited property seized by the bureau and not designated for its use, or not transferred to the

department of general services as provided above, shall be paid to the state treasurer to be used only as appropriated by the general assembly.

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Subsection(d)(4) provides a method whereby a seizing agency may use property taken or detained if the agency receives judicial authorization. The property can only be used by the seizing agency if the use has been authorized by the local circuit or criminal court and the property is to be used in the drug enforcement program of the county in which the goods are seized.

The term, "drug enforcement program," is not defined in the code. In construing statutory language, legislative intent and purpose is to be ascertained primarily from the natural and ordinary meaning of the language used when read in the context of the entire act or statute, without any forced or subtle construction to limit or extend the import of that language. *Oliver v. King*, 612 S.W.2d 152, 153 (Tenn. 1981); *Weaver v. Woods*, 594 S.W.2d 693, 695 (Tenn. 1980); The natural and ordinary meaning of the term, "drug enforcement program," when read in the context of the Tennessee Drug Control Act of 1989 suggests that it can be fairly interpreted as encompassing, *inter alia*, "reverse sting" operations, in which undercover law enforcement officers sell controlled substances to willing buyers, and other investigative operations related to the arrest and prosecution of drug offenders. Of course, as required by the statute, only the seizing agency can utilize the property and the use is confined to the drug enforcement program of the county in which the goods were seized.

It is, therefore, the opinion of this office that Tenn. Code Ann. Sec. 53-11-409(d) (1989 Cum. Supp.) authorizes a local circuit or criminal judge to allow police who seize controlled substances to use the property for "reverse sting" operations or other investigative operations related to the arrest and prosecution of drug offenders.

Charles W. Burson
Attorney General & Reporter

John Knox Walkup
Solicitor General

Gordon W. Smith
Assistant Attorney General